**CHESTER CHAI CHUNG CHING & ORS.**

**v.**

**DIVERSEY (FAR EAST) PTE. LTD.**

HIGH COURT, SINGAPORE
GOH PHAI CHENG JC
[ORIGINATING SUMMONS NO. 86 OF 1991]
29 APRIL 1991

***CONTRACT:*** *Construction of documents - Parol evidence - Meaning of "claims in the suit" - Evidence of pre-contract negotiations and drafts - Purposive approach - The "officious bystander" test - Implied terms - Evidence Act (Cap 5) [Sing], ss. 93, 94.*

***EVIDENCE:*** *Parol evidence rule - Exceptions - Extrinsic evidence - Evidence Act (Cap 5) [Sing], ss. 93, 94.*

In Suit No. 5626/1986,(the action) the defendants D had claimed against the plaintiffs for, *inter alia*, an injunction restraining the plaintiffs from using or divulging any trade secrets of D or trading with any suppliers of D. On 8 June 1989, the two parties reached an amicable settlement and the terms were reduced into writing (settlement agreement) whereby the plaintiff undertook to pay a sum of $400,000 to D. A consent judgment was also recorded which contained most of the contents of the settlement agreement.

Both the settlement agreement and the consent judgment order provide that D were entitled to taxed costs of the action on a party and party basis. When D presented their bill of costs for taxation, the plaintiffs disputed two items, viz item 639 for recovery of the professional fees paid by D to Coopers & Lybrand (C & L) and item 649 being the professional fees paid to CT and LS. The plaintiffs objected in principle to the inclusion of the latter in the bill of costs. At the hearing of the taxation, the Assistant Registrar directed the plaintiffs to make an application to determine the construction and ambit of the settlement agreement for the purpose of taxing the bill of costs.

The plaintiffs seek a declaration that D were not entitled to claim items 639 and 649. D had elected to claim the professional fees of C & L by pleading them as heads of loss and damage suffered by them in para. 12 of their statement of claim. D's claim for these two items had therefore been subsumed as, and they had throughout formed, part of D's claim for damages in the action.

**Held:**

**[1]** Payment of the $400,000 was in full and final settlement of all D's claims, including the professional fees of C & L and CTS which were pleaded in the statement of claim. It is clear from the language of the settlement agreement that the professional fees of C & L are included in the agreement and D cannot now claim these items by way of costs. By allowing D to recover these items now as costs in the taxation would be tantamount to "going behind" and totally disregarding the settlement agreement.

**[2]** If the professional fees of C & L and CTS were to be excluded from the settlement agreement, then the settlement agreement would have been drafted differently. The words "all claims in this suit" in clause. 7 of the settlement agreement are clear and unambiguous. It is clear from the statement of claim filed in the action that D sought to recover the fees of C & L and CTS as special damages. Those fees, although they could be claimed as costs, cannot now be recovered as costs in the action if they had been included in the damages claimed in the action.

**[3]** Since the terms of the settlement agreement are clear and unambiguous there is no need for the Court to look at the surrounding circumstances leading to the settlement agreement. By virtue of ss. 93 and 94 of the Evidence Act the pre-contract negotiations and drafts of the settlement agreement were not admissible.

**[4]** It is not correct to give the settlement agreement a purposive construction when its terms are clear and unambiguous, as is the case here. Neither is the test of the officious bystander applicable in this case.

**[5]** There is no evidence that the mistaken assumption of D was communicated to the plaintiffs or that the plaintiffs shared their view. This is not a proper case for this Court to give the directions sought by Counsel for D for the rectification of the settlement agreement on the ground of mistake.

*[Declarations sought by plaintiffs granted with costs.]*

**Cases referred to:**
*Prenn v. Simmonds [1971] 3 All ER 237* ***(foll)***
*United Malayan Banking Corp. Bhd. v. Tan Lian Keng & Ors. [1990] 1 MLJ 280* ***(cons)***
*Hjh Aminah bte. Bakri v. Manisah bte. Haji Bakri [1989] 2 CLJ (Rep) 950* ***(cit)***
*Doe & Ors. v. Biggs 127 ER 1017* ***(cons)***
*Manatee v. Brattle [1971] 1 All ER 464* ***(cit)***
*MFI Properties Ltd. v. BICC Group Pension Trust Ltd. [1986] 1 All ER 974* ***(cit)***
*Re Rothermere, Mellors Basden & Co. v. Coutts & Co. & Anor. [1986] 1 All ER 974* ***(cit)***
*Sze Hai Tong Bank v. Rambler Cycle Co. Ltd. [1959] AC 576* ***(cit)***
*Associated Japanese Bank (International) Ltd. v. Credit Du Nord [1989] 1 WLR 255* ***(cit)***
*Pasuma Pharmacal Corp. v. McAlister & Co. Ltd. [1965] 31 MLJ 221* ***(cit)***
*Huddersfield Banking Co. Ltd. v. Henry Lister & Sons Ltd. [1985] 2 Ch 273* ***(cit)***
*Olympia Sauna Shipping Co. S.A. v. Shinwa Kaiun Kaisah Ltd. [1985] 2 Ll LR 364* ***(cons)***
*The 'Nai Genova' [1984] 1 Ll LR 353* ***(cons)***

**Legislation referred to:**
Criminal Procedure Code [Sing], s. 152
Evidence Act (Cap 5) [Sing], ss. 91, 92, 93, 94

**Other sources referred to:**
*Sarkar's Law of Evidence*, 12th Edn.,
*Chitty on Contract*, 26th Edn.,

*For the plaintiffs - Yeo Lan Hock, (Johnny Cheo with him)*
*For the defendants - K.S. Low*

**JUDGMENT**

**Goh Phai Cheng JC:**

By an action filed in this Court by way of Suit No. 5626 of 1986 (the action), Diversey (Far East) Pte. Ltd. (hereinafter referred to as "Diversey"), who are the defendants in this summons claimed against the plaintiffs (that is, Chester Chai and 5 Ors.) for, *inter alia*, (a) injunctive relief to restrain the plaintiffs from using or divulging any trade secrets of Diversey; (b) trading or dealing with any trade suppliers who are suppliers of Diversey; and (c) damages for conspiracy to defraud or injure Diversey. A copy of the statement of claim is filed by Diversey in the action is reproduced as Exhibit "CCCC1" to the affidavit of Chester Chai Chung Ching filed on 5 February 1991 (hereinafter referred to as "the Chester Chai affidavit") in this summons.

On 8 September 1989, just prior to the trial, the plaintiffs and Diversey reached an overall settlement of the dispute in the action. The terms and conditions of the settlement were contemporaneously reduced into writing in an agreement dated 8 September 1989 executed by the respective solicitors on behalf of Diversey and the plaintiffs (hereinafter referred to as the "settlement agreement"). A copy of the settlement agreement is reproduced as Exhibit "CCCC2" to the Chester Chai affidavit. Further on 11 September 1989, a consent judgment order was recorded by Justice Yong Pung How (as he then was). The said judgment order recorded most of the contents of the settlement agreement. A copy of the said judgment order is reproduced as Exhibit "CCCC3" to the Chester Chai affidavit.

Both the settlement agreement and the judgment order provide that Diversey were entitled to taxed costs of the action on a party and party basis. Their bill of costs was duly presented and when it came up for taxation the following two items in the bill of costs were disputed by the plaintiffs:

(a) Item 639 in the bill for the recovery of the sum of $60,024 being the amount of the professional fees paid by Diversey to Messrs Coopers & Lybrand; and

(b) Item 649 in the bill for the recovery of the sum of $214.50 being the amount of professional fees paid to Commercial Trademark Services (Far East) Pte. Ltd. and Lionel Security Services Pte. Ltd. (collectively hereinafter referred to as "CTS").

Diversey had inadvertently mis-stated in their bill of costs the professional charges paid to CTS as $214.50. This was incorrect and the amount paid to CTS was $57,136.44. At the taxation of the bill of costs, the plaintiffs objected in principle (whilst reserving their right to also object to the quantum) to the inclusion of these fees in the bill of costs. In this respect, two affidavits were filed - one by Eric Trimble, on behalf of Diversey on 2 January 1991 and the other by Chester Chai Chung Ching on behalf of the plaintiffs on 21 January 1991. Copies of these two affidavits are reproduced as Exhibit "CCCC5" to the Chester Chai affidavit.

At the hearing of the taxation of the bill of costs on 25 January 1991, the learned Assistant Registrar, Mr. Chan Hian Young, as the Taxing Master, directed that an application be taken out by the plaintiffs to determine the construction and ambit of the settlement agreement with regard to the judgment order for the purpose of taxing bill of costs No. 572 of 1990 presented by Diversey in the action. The plaintiffs therefore took out this summons to claim against Diversey for the following reliefs, namely:

(1) a declaration that upon a true construction of the settlement agreement Diversey are not entitled to claim from the plaintiffs the professional fees paid by Diversey to Messrs Coopers & Lybrand and CTS with regard to the action;

(2) pursuant thereto, a declaration that items 639 and 641 of Diversey's bill of costs no. 572 of 1990 filed with regard to the action be struck off;

(3) any further or other directions or orders as may be necessary for giving effect to the settlement agreement and in particular with regard to Diversey's bill of costs no. 572 of 1990 filed in the action; and

(4) costs.

I heard the application on 21 February 1991 and on 26 February 1991 and I granted an order in terms of sub-paras. (1) and (4) above. I also made the following additional order:

> a declaration that the defendants are not entitled to claim party and party costs in respect of items 639 and 641 of the defendants' bill of costs no. 572/90 filed with regard to Suit No. 5626 of 1986.

The defendants have appealed and I now give my reasons.

*Issues before this Court*

Mr. Yeo, Counsel for the plaintiffs, submitted that the issues before this Court are:

(a) whether the terms and conditions of the settlement agreement are clear and unambiguous; and

(b) whether on a true construction of the settlement agreement, Diversey are disentitled from claiming from the plaintiffs as costs of the action the professional fees paid by them to Messrs Coopers & Lybrand and CTS.

The issues before this Court will therefore be determined by the construction which this Court will place on two documents - the settlement agreement and the judgment order. In my view, there is really one issue, namely, whether under the terms of the settlement agreement Diversey are entitled to recover the professional fees paid by them to Coopers & Lybrand and CTS in the party and party bill of costs presented for taxation in the action. The preamble to the judgment order made it clear that it was a consent order made pursuant to the settlement reached by the parties.

*Preliminary Ruling of Law sought by the Plaintiffs*

Mr. Yeo asked this Court to make a preliminary ruling of law, namely, that for the purpose of construing the settlement agreement and the judgment order the rule on parole evidence should be applied strictly. In other words, all earlier drafts and pre-agreement negotiations should be disallowed. He submitted that in the construction of a contemporaneous written agreement of compromise like the settlement agreement, no oral evidence should be admitted to contradict, vary, add to or subtract from the terms thereof. He relied on ss. 93 and 94 of the Evidence Act (Cap 5) and also illustrations (a) and (c) to s. 94. Section 93 provides that where the terms of a contract have been reduced by the parties to the form of a document, no evidence shall be given in proof of the terms of such contract except the document itself. Section 94 provides that no evidence of any oral agreement or statement as between the parties to any contract which have been reduced to the form of a document shall be admissible for the purpose of contradicting, varying, adding to, or subtracting from its terms except as provided by that section.

Similarly, as the terms of the settlement agreement are clear and unambiguous, Mr. Yeo submitted that evidence of negotiations preceding the settlement agreement and earlier drafts of the settlement agreement should not be admissible. He cited a passage from *Sarkar's Law of Evidence*, 12th Edn. at p. 785 which states that oral evidence of negotiations preceding a written contract is not admissible without first settling to what extent the contract was so ambiguous as to resort to such evidence. He also relied on para. 802 of *Chitty on Contracts*, 26th Edn. which states that where the parties have embodied the terms of their contract in a written document, the general rule is that parole evidence is not allowed to be given so as to add to or subtract from, or in any manner to vary or qualify, the written contract and evidence is not admissible to show that the subjective intentions of the parties were not in accord with the written document executed by them.

Mr. Yeo also referred to the following passage in para. 802 of *Chitty on Contracts*, 26th Edn:

> Extrinsic evidence inadmissible. Where the parties have embodied the terms of their contract in a written document, the general rule is that 'verbal evidence is not allowed to be given ... so as to add to or to subtract from, or in any manner to vary or qualify the written contract.'

> This rule is often known as the parole evidence rule. Its operation is not confined to oral evidence, but extends to extrinsic matter in writing, such as drafts, preliminary agreements and letters of negotiations. Evidence is not admissible of negotiations between the parties, nor is it permissible to adduce evidence to show that their subjective intentions were not in accord with the written instrument. The rule applies to all contracts whether in writing or under seal, ...

Mr. Yeo also referred to the following *dicta* of Lord Wilberforce in *Prenn v. Simmonds* [1971] 3 All ER 237 at p. 240:

> ... although in construing a written agreement the Court is entitled to take account of the surrounding circumstances with reference to which the words of the agreement were used and the object, appearing from those circumstances, which the person using them had in view, the Court ought not to look at the prior negotiations of the parties as an aid to the construction of the written contract resulting from those negotiations. Evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and, objectively the 'aim' of the transaction.

Mr. Yeo cited the case of *United Malayan Banking Corp. Bhd. v. Tan Lian Keng & Ors.* [1990] 1 MLJ 280 where the High Court of Malaya held that:

> (1) The Evidence Act 1950, by s. 91, excludes extrinsic evidence being adduced of the terms of a document by providing that no evidence may be given in proof thereof except the document itself and by s. 92 an interdict is imposed on the admissibility of extrinsic evidence being adduced by the parties thereto in variance with or in contradiction of or in addition to or in subtraction of the terms of a document.
>
> (2) Even if evidence of negotiations is admitted because the action raises a question of rectification, or misrepresentation, the Court should not allow itself to be influenced by that evidence when it comes to construe the agreement.
>
> (3) The effect of admitting extrinsic evidence of the 'understanding' would be to vary or to contradict the terms of the guarantee and indemnity and this would fall foul of the provisions of ss. 91 and 92.

Mr. Low, Counsel for Diversey, contended that extrinsic evidence is admissible under proviso (f) of s. 94 and he cited the case of *Hjh Aminah bte Bakri v. Maniseh bte Haji Bakri & Ors.* [1989] 2 CLJ (Rep) 950 in support of his contention. In that case Chao Hick Tin JC (as he then was) held, *inter alia*, that the rule against parole evidence embodied in s. 94 of the Evidence Act is not absolute and one of the exceptions is that any fact may be proved which shows in what manner the language of a document is related to existing facts. In my view, proviso (f) of s. 94 of Evidence Act does not allow any party to a written contract to refer to the prior negotiations and earlier drafts of the document. This proviso could be applied in the following manner as was suggested by Mr. Yeo. If A contracts with B for sale of Blackacre to B, evidence may be used to show where Blackacre is situated. That's the purpose for which the proviso is inserted. It does not allow parties to go behind the same and refer to prior negotiations. I accepted Mr. Yeo's contention. I decided not make the preliminary ruling sought by Mr. Yeo until I have heard the submissions of the parties on all points regards the true meaning and intent of the settlement agreement.

*The Construction of the Settlement Agreement*

Clause. 1 of the settlement agreement deals with the injunctive relief sought by Diversey. Clause. 2 states that the 1st, 2nd, 3rd and 6th defendants in the action undertake to pay a sum of $400,000 to Diversey.

Clause 3 reads:

> a. The 1st, 2nd, 3rd and 6th defendants agree to pay to the plaintiffs their costs of the action, the same to be taxed if not agreed.
>
> b. The said defendants shall be entitled to set off against any sum due to the plaintiffs by way of costs, any photocopying charges incurred by the plaintiffs' solicitors in respect of documents requested by them from the defendants' solicitors as well as any sum due to the defendants in respect of any outstanding order for costs.

Clause 5 reads:

> The plaintiffs will waive the photocopying charges incurred by the defendants' solicitors in respect of duplicate copies requested by them in the course of discovery in the suit.

It is not necessary for me to refer to cls. 4 and 6 of the settlement agreement for the purposes of this application.

Clause 7 of the settlement agreement, which is the subject of lengthy submissions by Counsel of the respective parties, reads:

> 7. In consideration of the mutual agreements and undertakings set out in this agreement:
>
> i. The plaintiffs in the suit unconditionally and irrevocably release and discharge the defendants in the suit, and each of them from any and all claims, demands and liabilities of whatsoever nature and whensoever arising or incurred up to and inclusive of the date hereof, including but not limited to the claims in the suit, provided always that nothing herein shall preclude the plaintiffs in the suit from initiating committal proceedings against the 1st, 2nd and/or 3rd defendants in the suit for breach at any time after 12 November 1986 of the terms of the order of Court referred to in para. 1 hereof; and
>
> ii. The defendant in the suit and each of them, unconditionally and irrevocably release and discharge the plaintiffs from any and all claims, demands and liabilities of whatsoever nature and whensoever arising or incurred up to and inclusive of the date hereof.

I note that under clause. 7, Diversey had agreed to release the plaintiffs in this summons (i.e. Chester Chai and 5 others) from "all claims, demands and liabilities of whatsoever nature and whensoever arising or incurred up to and inclusive of the date hereof, **including but not limited to the claim in the suit.** (Emphasis added by me).

What then are Diversey's "claims in the suit"? Mr Yeo contended that they include the two disputed items in the bill of costs. Diversey had elected to claim the professional fees of Coopers & Lybrand and CTS by pleading them as heads of loss and damage suffered by them in para. 12 of their statement of claim. Diversey's claim for these two items had therefore been subsumed as, and they had throughout formed, part of Diversey's overall claim for damages in the action. Diversey's position on this had been consistent as the invoices for the professional fees for the two items and the reports were included in Diversey's list of documents and discovery was given on these items: see para. 13 of the affidavit of Eric Trimble filed on behalf of Diversey on 14 February 1991 (hereinafter referred to as "the ET Affidavit"). The plaintiffs had entered into the settlement agreement on the aforesaid basis and the payment of $400,000 pursuant to the settlement agreement was in full and final settlement of all Diversey's claims, including the professional fees of Coopers & Lybrand and CTS which were pleaded in the statement of claim. It is clear from the language of the settlement agreement that the professional fees of Coopers and Lybrand and CTS are included in the agreement and Diversey cannot now claim these items by way of costs.

In para. 12 of the statement of claim, the professional fees of Coopers & Lybrand and CTS were claimed by Diversey as distinct heads of special damages in the action. Clause 7(i) of the settlement agreement states that in consideration of the payment of $400,000 Diversey unconditionally and irrevocably released and discharged the plaintiffs from "any and all claims, demands and liabilities of whatsoever nature of the date hereof, including but not limited to the claims in the suit...". By allowing Diversey to recover these items now as costs in the taxation would be tantamount to "going behind" and totally disregarding the settlement agreement. If the professional fees of Coopers & Lybrand and CTS were to be excluded from the settlement agreement, then the settlement agreement would have been drafted differently. For example, in the case of the photocopying charges (which were not referred to in the statement of claim) these were expressly provided for in clause. 5 of the settlement agreement. There was therefore no need for a specific reference in the settlement agreement to the professional fees of Coopers & Lybrand and CTS as these were already pleaded by Diversey in their statement of claim and the plaintiffs had relied upon it.

On the construction of the settlement agreement, Mr Low contended that the agreement is clear and unambiguous. The relief sought in the action was a claim for injunction, damages and costs. The settlement agreement dealt with the injunction, amount of compensation to be paid by the plaintiffs to Diversey and costs of the action. In exchange it also dealt with waiver of claims. In dealing with that, it clearly sought to waive all claims between the parties up to a certain cut-off date. That's because of the nature of the relationship of the parties. The stand of the plaintiffs were that if they were going to pay Diversey $400,000 by way of compensation and the injunction is to continue permanently and Diversey are to have the costs of the action, the plaintiffs are entitled to a waiver of all claims right up to a certain cut-off date. In that context, claims means right of action in respect of matters between the parties. The cut-off date was way after commencement of the action. Obviously the plaintiffs wanted to include claims in the action. Because of that, the phrase "including but not limited to claims in the suit" was inserted into clause. 7(i) of the settlement agreement.

Mr Low contended that clause. 3(a) of settlement agreement comes first. It is clear and unqualified. In the construction of an agreement, unlike a will, the earlier words take precedence. In our instant case, it will be clause. 1, then the $400,000 compensation and, thirdly, the provision on costs. He submitted that the costs provision is clear. Diversey are entitled to include the dispute items as costs in the suit. In support of his argument, Mr. Low referred to the following dicta of Mansfield CJ in *Doe & Others v. Biggs* 127 ER 1017 at p. 1019:

> This case might be argued and considered for ever without advancing it all in law, reason, or precedent. But as it happens, in this will, the last words are, "permit and suffer" which give the *cestui que trust* a legal estate; and the last words in a will, shall prevail; and consequently, for want of a better reason, we are forced to say that we think this will give the legal estate to the party beneficially interested ...

Applying that principle to our instant case, Mr Low maintained that because clause. 3(a) comes before clause. 7(i) and clause. 3(a) is clear and unqualified as to party and party costs, and since these two disputed items are normally allowed in party and party costs, Diversey are entitled to them. Items 639 and 641 are disbursements which would normally be allowed in party and party taxation subject to assessment.

According to Mr Low, the words "including but not limited to claims in suit" in clause. 7(i) mean rights of action in the suit. It does mean and is equated with claims described in statement of claim. The parties were settling and the plaintiffs were eager to obtain a waiver

in that suit. That phrase should be viewed in that context and when viewed in that way that phrase would mean including Diversey's rights of claim in the action. What are the defendants's rights of claim in the action? He submitted that it is the right to an injunction order, the right to claim damages in respect of the "Revcon transactions" and the "Protec conspiracy" and the right to the costs of the action. Claims for Coopers and Lybrand's and CTS's professional charges and the like are not strictly claims for damages. They are cost items. Even if this Court were to equate claims in the suit to claims stated in the statement of claim, that cannot have effect of turning essentially cost items into claims for damages.

If this Court does not or is unable to construe in the way suggested by Mr Low, then Mr. Low maintained that there is an ambiguity or inconsistency in the provisions of the settlement agreement on the question of whether Diversey are entitled to include items 639 and 641 in their party and party bill of costs, and this Court is entitled to and ought to look to the surrounding circumstances leading to the settlement agreement in order to ascertain the true intention of the parties, on the said issue.

In my view, the words "claims in this suit" in clause. 7 are clear and unambiguous. They mean what is claimed by Diversey in the action, i.e. injunctive relief, damages and costs. Since the disputed items in the bill of cost had been expressly pleaded and particularised in para. 12 of their statement of claim in the action, Diversey had in effect asked the Court to award damages to compensate them for expenditure incurred by them as professional fees paid to Coopers & Lybrand and CTS. Damages are in effect a sum of money awarded by a Court as compensation for a tort or a breach of contract. Diversey having asked the Court in their statement of claim to award a sum of money to compensate them for the professional fees paid by Diversey to Coopers & Lybrand and CTS cannot now say that these items were not included in the "damages" sought by them in the action.

As for the construction of the settlement agreement, the *dicta* of Lord Wilberforce in *Prenn v. Simmond* [1973] 1 All ER 237 at p. 241 (reproduced earlier) has made it clear that "I am entitled to look at the "genesis" of the settlement agreement", that is to say the statement of claim filed by Diversey in the action. To me, it is clear from the statement of claim filed in the action that diversey sought to recover the fees of Coopers & Lybrand and CTS as special damages. Those fees, although they could be claimed as costs, cannot now be recovered as costs in the action if they had been included in the damages claimed in the action. In *Manatee v. Brattle* [1971] 1 All ER 464 the question was raised whether the fees of a witness, which included expenditure that could have been claimed as damages in an action but were not included in the damages claimed, can be claimed instead as costs. Mocatta J. held that he could see no reason why they should not be, so long as they have not been included in the damages claimed.

Having reached the conclusion that the terms of the settlement agreement do not allow Diversey to recover the disputed cost items in their party and party bill of costs, I accordingly rejected Mr Low's contention that if I am unable to construe the settlement agreement in the manner described by him, then there is an ambiguity or inconsistency in the provisions of the settlement agreement on the disputed cost items and I ought to look at the surrounding circumstances leading to the settlement agreement in order to ascertain the true intention of the parties on the said issue. There is also no necessity for me to do so as the terms of the settlement agreement are clear and unambiguous. Furthermore s. 93 of the Evidence Act provides that when the terms of a contract have been reduced by the parties to the form of a document, no evidence may be given in proof of the terms of such contract except the document itself and s. 94 excludes the admissibility of extrinsic evidence being adduced by

the parties thereto for the purpose of contradicting, varying, adding to, or subtracting from its terms. The pre-contract negotiations and the drafts of the settlement agreement are not admissible under proviso (f) of s. 94 of the Evidence Act.

*Should the Settlement Agreement be given a purposive construction?*

Mr Low asked this Court to give the settlement agreement a purposive construction and to have regard to the fact that the settlement agreement was an amicable out of Court settlement by the parties. The plaintiffs had agreed to pay $400,000 as compensation in lieu of damages. The plaintiffs had also agreed to pay the party and party costs of the action. Diversey had agreed to waive all claims, meaning all rights of action against the plaintiffs up to a certain date including the claims in the suit. Mr Low's contention was that "claims in the suit" should be construed to mean rights of action in the suit. In the context of the action, it means the claims for injunction, damages and costs. According to him, it would be in accordance with the apparent commercial purpose of the settlement agreement to construe the phrase "claims in this suit" as meaning claims for damages in the suit. It follows that "claim in the suit" cannot include the Coopers & Lybrand's and CTS's fees since they are cost items and would not properly be claimed as damages in the suit. He cited the case of *MFI Properties Ltd. v. BICC Group Pension Trust Ltd.* [1986] 1 All ER 974 in support of his contention. In my view it is not correct to give the settlement agreement a purposive construction when its terms are clear and unambiguous. The Court in the *MFI Properties Ltd.* case adopted a purposive construction because the rent review clause in the lease which was being considered by the Court was reasonably capable of bearing more than one meaning. It was for that reason that the Court held that it was entitled to have regard to the context and commercial purpose of the clause when choosing one meaning in preference to the other.

Mr Low also cited the case of *Re Rothermere, Mellors Basden & Co. v. Coutts & Co. & Anor.* [1986] 1 All ER 974 where the Court held that if there is an inconsistency and there are two possible approaches, the Court will chose the one which will not lead to an absurdity. Here again, I must emphasise that the phrase which the Court had to construe in the *Re Rothermere* case was capable of two constructions. In our instant case the terms of the settlement agreement are clear and unambiguous and it leads to only one conclusion, namely that Diversey's claim for the Coopers & Lybrand's and CTS's charges have been included in the $400,000 payable as compensation to Diversey.

*The Test of the "Officious Bystander"*

Mr Low's next contention is that in the construction of the settlement agreement, the Court should use the test of the officious bystander in order to infer an implied term. If somebody at the meeting at which the settlement agreement was concluded was asked whether the words "including the charges of Coopers & Lybrand and CTS" should be added to clause. 3 (a), Mr Low maintained that both parties at that time would have answered "yes, of course". He referred to the cases of *Sze Hai Tong Bank v. Rambler Cycle Co. Ltd.* [1959] AC 576 and *Associated Japanese Bank (International) Ltd v. Credit Du Nord* [1989] 1 WLR 255 where the Courts applied the test of the officious bystander. He also cited *Pasuma Pharmacal Corp. v. McAlister & Co. Ltd.* [1965] 31 MLJ 221 where Thomson LP examined the authorities on warranties implied by law by using the test of the officious bystander. All these cases which have been cited by Mr Low do not in my view have any bearing on our instant case where the terms of the settlement agreement are clear and unambiguous. In the *Sze Hai Tong Bank*'s case, the Court was asked to construe a clause in a bill of lading which seeks to

exempt a carrier from liability for loss or damage to goods and the Court used the officious bystander test to limit the operation of that clause. The *Associated Japanese Bank (International) Ltd.*'s case dealt with a contract of guarantee which the Court held was void ab initio because the machines, the subject of the guarantee, did not exist.

*The Contra Proferentum Rule*

Mr Low also urged this Court to apply the *contra proferentum* rule when attempting to ascertain the meaning of the words "claims in the suit" in clause. 7(i) of the settlement agreement because that clause (which appeared in a draft of the settlement agreement prepared by diversey's solicitors) had been revised by the plaintiffs' solicitors. The first draft of the settlement agreement was prepared by Diversey's solicitors. The plaintiffs' solicitors amended the draft by inserting a new clause. 7(i): see Exhibit 4 to the ET affidavit. If there is any ambiguity, Mr Low contended that the *contra proferentum* rule requires this Court to construe that clause against the plaintiffs. If I were to apply the *contra proferentum* rule to the instant case in the manner suggested by Mr Low then I will have to ask myself which party drafted which clause of the settlement agreement. This, in my view, cannot be the correct approach which I am required to take under the contra proferentum rule.

*Can the settlement agreement be construed in favour of the plaintiffs without the judgment order being set aside?*

Mr. Low contended that unless and until the judgment order is set aside by the plaintiffs (and no reason or basis has been put forward by their plaintiffs why it should be set aside), Diversey are entitled to enforce it and have its bill of costs taxed in the usual way and that would include Cooper & Lybrand's and CTS's charges. An order of Court can be set aside on the same ground an agreement can be set aside, for example, fraud, misrepresentation, etc. Mr. Low contended that the judgment order is clear on the question of costs. It says the plaintiff to pay "costs of the action, the same to be taxed if not agreed", and that reinforces his strict interpretation of the settlement agreement. If he were wrong on this argument, then it is his contention that the plaintiffs will have to set aside the judgment order and for them to do so the plaintiffs would have to show that there was a mistake in the judgment order concerning costs. The stand which the plaintiffs have taken is that if they succeed on the construction of the settlement agreement, then they need not pay the disputed cost items in the party and party bill of costs notwithstanding the terms of the judgment order. That, he submitted, cannot be correct and that this Court in deciding this matter should give directions as to how this issue is dealt with. Otherwise, the parties will find themselves in a situation where this Court construes the settlement agreement against Diversey while the judgment order remains intact and valid but enforceable.

I do not accept Mr. Low's contention that unless and until the plaintiffs set aside the judgment order, Diversey are entitled to the two disputed items even if this Court construes the settlement agreement in the plaintiffs' favour. The two disputed items were treated as damages in Diversey's statement of claim and have therefore been subsumed into clause. 7(i) of settlement agreement. The plaintiffs have been released from all claims of Diversey. The judgment order and the settlement order must be read together and therefore those two items fall outside the ambit of the word "costs" in the judgment order in the settlement agreement. Furthermore, the preamble of the judgment order stated very clearly that it is a consent order made pursuant to a settlement reached between the parties on 8 September 1989. Lord Wilberforce in *Prenn v. Simmons* has made it clear that I am entitled to look at the settlement agreement since it is the "genesis" of the judgment order. Furthermore, clause.

5 of settlement agreement has made it clear that Diversey is not entitled to claim the photocopying charges as cost items in the action. This clause was not embodied in the judgment order. It is also clear that such charges should normally be allowed in a party and party bill of costs. Diversey had included the photocopying charges as an item of costs in their bill of costs and it was withdrawn when their attention was drawn to the terms of the settlement agreement. Clearly both the settlement agreement and judgment order must be read together. It is incorrect for Mr Low to say that the judgment order has a life of its own.

*Rectification of the Settlement Agreement on the basis of a mistake*

Mr Low also contended that there is a common mistake between the parties and the Court has the jurisdiction and power to rectify the mistake. In the instant case, even if the terms of the settlement agreement are clear, a party is entitled to say that there was a mistake and the mistake could be a common mistake or a unilateral mistake. If a party says that then in an originating summons this Court would have to give directions as to how the issue should be dealt with by parole evidence or affidavit evidence with cross-examination of the deponents of the affidavits. He referred to the case of *Huddersfield Banking Co.Ltd. v. Henry Lister & Son Ltd.* [1985] 2 Ch. 273 for the Court's jurisdiction to set aside a consent order upon any ground which would invalidate an agreement between the parties. In support of his contention Mr Low also relied on the following passage in *The "Nai Genova" case* [1894] 1 L1. LR 353 at p. 359:

> The relevant authorities relating to rectification
>
> In principle, the remedy of rectification is one permitted by the Court, not for the purpose of altering the terms of an agreement entered into between two or more parties, but for that of correcting a written instrument which, by mistake in verbal expression, does not accurately reflect their true agreement. It follows that the general rule is that rectification will not be granted unless there has been a mistake in verbal expression common to all parties.
>
> As the law stands, the conditions which must be satisfied if rectification is to be granted on the grounds of common mistake may, in my opinion, be summarized as follows:
>
> Firstly, there must be a common intention in regard to the particular provisions of the agreement in question, together with some outward expression of accord. Secondly, this common intention must continue up to the time of execution of the instrument. Thirdly, there must be clear evidence that the instrument as executed does not accurately represent the true agreement of the parties at the time of its execution. Fourthly, it must be shown that the instrument, if rectified as claimed, would accurately represent the true agreement of the parties at that time: (see generally *Snell's Equity*, 28th Edn. [1982] at pp. 612-614).
>
> The standard of proof required in an action of rectification to establish the common intention of the parties is the civil standard of balance of probability. Nevertheless, parties who append their signature to a written instrument *prima facie* indicate, by the very fact of their signatures, their assent to all the terms contained in it. In these circumstances -
>
> ... as the alleged common intention *ex hypothesi* contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself ... (see *Thomas Bates v. Wyndham's (Lingerie) Ltd.*, [1981] 1 WLR 505 at p. 521 per Lord Justice Brightman).
>
> Such, therefore, are the fairly stringent requirements which a plaintiff must satisfy if he is to succeed in establishing a claim to rectification on the grounds of common mistake.

Mr Low also referred to para. 9, 10 and 11 of the affidavit of Eric Trimble filed on 14 February 1991 to show that:

(a) during the negotiations on 7 and 8 September 1989, both parties regarded the monetary compensation as compensation for Diversey's claim for damages arising from the Revcon transactions and the Protec conspiracy and that these were the claims in the action which were intended to be waived by the settlement agreement;

(b) the professional charges of Coopers & Lybrand's and CTS's never featured in the negotiations and both parties had assumed that they would come under the costs provision in the settlement agreement; and

(c) the said professional charges (then and as it is now the case), would be regarded as items which would normally be allowed in party and party taxation subject to their proper quantum being assessed.

Accordingly, if, contrary to the defendant's contention, this Court should regard the words "the claims in the suit" in clause. 7(i) of the settlement agreement as including the said professional charges, Mr Low submitted that this Court should in the interests of justice and equity rectify the settlement agreement in such a way as to give effect to the common intention of the parties and this could be done by inserting a proviso to clause. 7(i) such as "provided that the charges of Coopers & Lybrand, CTS and Lionel Security Services shall from part of the defendants' costs in the action.

Mr. Low submitted that having regard to the nature of the dispute (that is, to determine whether the two items of professional charges are to be included in the party and party bill of costs), evidence of what took place between the parties' respective solicitors from 2 September 1989 onwards would be relevant and useful and, if he were wrong on that, then what took place on 8 and 9 September 1989 would be relevant as existing facts for the purpose of proviso (f) of s. 94 of Evidence Act.

The plaintiff's Counsel, Mr Cheo, submitted that proviso (f) of s. 94 of the Evidence Act does not allow the parties to refer to prior negotiations and earlier drafts of the settlement agreement. He also cited the following passage from *Sarkar's Law of Evidence*, 12th Edn. at page 804:

> As to correction of clerical or arithmetical mistakes in judgments, decrees, etc. see s. 152 C P Code.
>
> (1) Individual, mistake, not known to or induced by the second party. Where a jural act is executed by signing a specific and complete document, the second party has a right to treat the signed contents as representing the terms of the act. The principle of reasonable consequence plainly requires this result. That the signer did not intend to execute such terms is immaterial, and whether the lack of intent was due to a failure to read it over, or to some other cause, is immaterial. In other words, his individual innocent mistake or deliberate secret dissent cannot be shown. Such may be taken to be the general rule. As exceptions to the rule, there may be two classes of cases:
>
> (i) Where a document was drafted and prepared by the second party, and contains also parts which physically constitute virtually a separate document and are not included in the scope of the first party's signature, it may be proper, in order to protect against imposition, to exonerate him if he misunderstood the extent of the terms to which his signature applied.
>
> (2) Individual mistake known to or induced by the second party. Where the party's error as to the contents of the signed document is known to the second party, the first party may, of course, by the general principle insist upon the terms as supposed by him, because these are identical with those which he appeared to the second party to be intending to utter.

(i) The ordinary instance is that of fraudulent misrepresentations of the document's terms by the second party; and, in particular, a false reading to a person illiterate, blind, or alien.

(ii) Where the first party's error is merely known to the second party, without fraudulent means by the latter, the result is still the same, for the latter cannot claim that the first party's expressed words were reasonably so accepted by him; ...

(3) Mutual mistake.

(i) Concerning mutual mistake and its effect on the terms of the jural act, it is necessary at the outset to exclude two questions which do not involve the present principle. In the first place, the question what sort of mistake - including individual mistake - will suffice to bar a bill for specific performance is a distinct one; it involves merely the choice of remedies, not the terms of the valid act. In the next place, the question whether an act may be avoided for a mistaken assumption of fact external to the contract, is a distinct one; belonging to the principle of a avoidability [see ss. 20, 21, 22 Contract Act].

Mr Cheo also cited *Olympia Sauna Shipping Co. S. A. v. Shinwa Kaiun Kaisah Ltd.* [1985] 2 L1. LR 364 which held that unless a party is able to show a mistake common to both parties the Court will not order any rectification of an agreement between the parties and, in the case of a unilateral mistake, the Court held that no rectification will be ordered unless the party seeking the rectification satisfy certain stringent conditions which are:

(a) that party seeking rectification must show that he mistakenly believed the written instrument to be an accurate expression of their bargain with the non-mistaken party when in truth it was not;

(b) the non-mistaken party had actual knowledge of the mistaken party's mistake at the time the agreement was made;

(c) the non-mistaken party's conduct must be shown to be unconscionable so as to lead equity to intervene.

On this point of mutual mistake, I find that the allegations in the relevant paragraphs of the affidavit of Eric Trimble do not show that the mistaken assumption of Diversey was communicated to the plaintiffs or that the plaintiffs shared their view. Having regard to the evidence in the said affidavit of Eric Trimble and the authorities cited above, I concluded that this is not a proper case for this Court to give the directions sought by Counsel for Diversey for the rectification of the settlement agreement on the ground of mistake.

Accordingly, for the reasons given above, I made the following declarations on 26 February 1991:

(a) that upon a true construction of the settlement agreement Diversey are not entitled to claim from the plaintiffs the professional fees paid by Diversey to Messrs Coopers & Lybrand and CTS with regard to the action; and

(b) that the defendants are not entitled to claim party and party costs in respect of items 639 and 641 of the defendants' bill of costs No. 572/90 filed with regard to suit No. 5626 of 1986.

I also awarded the plaintiffs the costs of this application.

Also found at [1991] 3 CLJ 2632